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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 269.

MARGARET M. BRADY, as Administratrix of James P. Brady, deceased,

Petitioner,

against

ROOSEVELT STEAMSHIP COMPANY, INC.,

Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

Respondent's brief (p. 8) contains a complaint about the alleged error of the trial judge in excluding certain testimony offered in an effort to establish the ultimate liability of the United States to pay any judgment recovered, on the theory that a tort judgment was considered a part of the "operating expenses" of the vessel.

Respondent's brief (p. 5) further complains that there was a deficiency of proof that the ladder was provided by the defendant, or that the defendant employed the crew, and that its motion to dismiss (R. 83-103) upon those grounds should have been granted.

But, however erroneous either ruling may have been, the defendant waived and abandoned them by not assigning or specifying error thereon in its appeal to the Circuit Court

of Appeals. There was one, and only one, point or question raised by the appellant's brief in that court, and it was thus stated:

"POINT ONE.

The District Court, sitting at common law, did not have jurisdiction of the subject matter".

There was no other point; there was no specification of error upon the exclusion of evidence or the refusal to dismiss on the merits. There was neither argument nor citation in respect of the exclusion of evidence or the denial of the motion to dismiss on merits for failure of proof.

Furthermore, the defendant, for the purpose of its attack upon the jurisdiction of the court, abandoned all contention about who employed the crew or who operated the boat. It rested its fate solely and entirely upon its attack on the jurisdiction.

In defendant counsel's affidavit attached to the application for reargument of the motion to dismiss for lack of jurisdiction, made before the trial, it was said:

> "For the purpose of this motion it may be assumed that the defendant, Roosevelt Steamship Company, Inc., operated and controlled the vessel on which the accident happened, and employed the crew, and that because of this it may be held liable to the plaintiff for negligence . . ." (Parmer's affidavit, R. 42).

At the trial, and after plaintiff had rested, Mr. Parmer renewed his motion and said:

> "Your Honor, I move that the action now pending against the Roosevelt Steamship Company, Inc., be dismissed on the ground that the court has not jurisdiction of the subject matter. My motion is not based upon a contention that Roosevelt Steamship Company

did not control and operate the vessel. I am assuming, for the purpose of this motion, that Roosevelt Steamship Company did operate and control the vessel and employed the members of the crew . . ." (R. 90, bottom).

During a colloquy with the court Mr. Parmer said:

"Well, so far as operation and control of the vessel that, your Honor, should be precluded; but that is not the point I am raising here as to who operated and controlled this vessel. My sole point here is, assuming that the Circuit Court of Appeals is right and that we did operate this vessel and all these people are our agents nevertheless by reason of the contract the government pays the bill eventually, and that is really the point I am making" (R. 87).

The only question presented to the Circuit Court of Appeals was one of jurisdiction. The defendant elected to stand or fall on that one proposition. The concluding *resumé* of the point urged as to why there should be a reversal, was thus stated:

(a) The vessel was owned by and operated "for the United States."

(b) If the vessel had been privately owned a proceeding in admiralty could have been maintained.

(c) The exclusive remedy for the tort is a proceeding against the United States, in admiralty, as a substitute for every other remedy against every other person acting "for the United States" (Appellant's Brief, C. C. A., p. 20).

Not a word was said about failure of proof of negligence or of errors in the exclusion of testimony.

There was just the one, isolated, clear-cut question as to the lack of jurisdiction over the subject-matter which was presented to the Circuit Court of Appeals, and that was the only question decided by that court. The trial judge had approved the verdict both as to propriety and reasonableness and *no attack was made upon the verdict.*

The petitioner (plaintiff below) asked this court to grant certiorari to review the Circuit Court's decision on the question of jurisdiction and certiorari was granted to review that question.

Under the rules and decisions of this court it will not now consider any question not raised in, and presented to, the Circuit Court of Appeals. That rule would entirely remove respondent's Point II, to-wit, that Roosevelt Steamship Company did not employ the crew. That Point should be eliminated from consideration because it was not raised in the court below.

> "Review by this court will be confined to errors alleged in the Petition and this court will not consider questions not raised in the court below, even though certiorari brings up the whole record."
>
> Supreme Court Rule 38, par. 2, following 28 U. S. C. A., Sec. 354.
> Gen'l Talking Corp. v. Western Electric, 304 U. S. 175(1).
> Crown Cork Co. v. Ind. Pier Co., 304 U. S. 159.

But the trial court was right in rejecting evidence which was designed to alter, interpret or change the plain and unambiguous language of the operating agreement. The court was not at liberty either to disregard the words used by the parties, which were descriptive of the subject-matter, or to supply words not made use of, or to permit any modification or novation of the agreement where the

words are simple, clear, non-technical and easily understood.

Norrington v. Wright, 115 U. S. 188.
Harrison v. Portland, 161 U. S. at page 63.
Seitz v. Brewers Ref. Corp., 141 U. S. 510.

"A court is not warranted, under the guise of construction, in importing into a contract an ambiguity which would not exist, by forcing from plain language unusual and unnatural meanings."

Berryhill v. Peoria Life Co., 284 U. S. 488, 492.

"The court may not inquire into the secret or unexpressed intention of one or both of the parties."

Chi. Ry. Co. v. Maryland Casualty, 75 Fed. (2d) 600.

Therefore any evidence as to private practice or bookkeeping arrangements at variance with the contract provisions, was properly rejected.

Persons having business with, or claims against, the vessel would be justified in acting upon the assumption that the agreement meant what it said, to wit, that the Roosevelt Steamship Company was to man, equip, supply and keep the vessel in repair, and actually operate it. If the master of the vessel had made purchases of victuals for the crew, or contracted to have minor repairs made, the United States would be estopped to come in and say that, by private practice, the contract provisions had been abandoned and the ship chandler or the repairman must lose his right to hold the operator liable at common law.

A jury trial is a valuable right. The effort of the Roosevelt Steamship Company to get this case before an admiralty judge was somewhat influenced by its desire to avoid a jury trial (R. 94, bottom) but more particularly

by the realization that, if the common law action could be defeated on jurisdictional grounds, and the plaintiff relegated to admiralty, that would be *an end of the case* because, having accepted compensation, the widow *could not sue the United States, and no damages could be collected.* It was high strategy which conceived that method of defeating this widow and her children.

The exclusion of the offered testimony to vary the terms of the written agreement was entirely right, but whether it was not, the question is not now properly before this court.

The operating agreement was not collaterally involved. It was *directly* involved. It was basic as establishing the relationship of the contracting parties, a condition precedent to the suit, which was really akin to an action for tortious breach of the contract obligation to keep the ship's appliances in good repair (Par. 11, R. 26).

The contract being thus directly involved the decisions, cited by respondent, on the theory that it was but collaterally involved, have no application.

Nor was there any failure to prove that the ship supplied the ladder. When the vessel moved into the dock a ladder was swung by her winches from the ship, over the side, and placed against the ship's rail, the foot of the ladder resting on the dock (R. 62). From such facts it is fairly inferable that it was the ship's ladder—it was in its custody and control and it was handled by the ship's winches and crew.

The Customs Inspectors were in the habit of using such ship's ladder. They were never told not to use them, nor were they prohibited from using them (R. 72-73). If a ladder had been placed by the vessel from rail to dock it was considered to have been put there for use by the inspectors (R. 74, top). The placing of the ladder, plus the knowledge of the habit of these inspectors to hasten aboard the vessel, was an invitation to use.

Respondent's Point II not only attempts to raise fact questions not properly before this court but is an actual attempt on this appeal to have this court, in effect, grant a belated certiorari and posthumously, as it were, review the Quinn decision. In fact the respondent invites this court to consider and to overrule the Quinn case (Respondent's Brief, p. 41, top).

Respondent repeats the error made by the petitioner in the Quinn case, by saying (Brief, p. 26).

> "The Chief Justice of this Court, while Attorney General, expressed the opinion that such agents (of the Fleet Corporation) are not employers of the crews but that the United States is."

In the first place, the opinion referred to (1925) was not written by the present Chief Justice but was prepared by an assistant to the Attorney General. We refrain from naming him.

It was such an erroneous statement of the law that the Comptroller General, in 1930, rendered a contrary opinion, which he based upon the decisions of this court (see Opinion of the Comptroller General, A-31,684).

The question was, whether, under the Shipping Board operating agreements, the crews were employees of the operator or civil employees of the United States. If the latter then they were under the Federal Employees' Compensation Law. The Comptroller General said:

> "Accordingly, in view of the latest rulings of the Supreme Court of the United States, above cited, the form of agreement for 'operation' of ships, and the specific provisions contained in the annual appropriation acts for the purchase of all forms of insurance by the Merchant Fleet Corporation, it is only reasonable to conclude that, under existing law, the Employees Compensation Commission may not enter-

tain, settle, or pay any claims under the Employees Compensation Act by or on behalf of members of the crews of vessels owned or operated by the United States Shipping Board Merchant Fleet Corporation, or the beneficiaries of such who die as the result of such injuries sustained in the course of their employment on such vessels."

The respondent relies upon the *Lustgarten* decision but, singular to note, it carefully does not mention the *Sloan Shipyards* case anywhere in its brief.

It vehemently argues that, under the *Lustgarten* case, if the government owns the vessel and it is operated by any agent "for the United States", *ipso facto* the exclusive remedy for any maritime cause of action is under the Suits in Admiralty Act.

All right to sue an agent at law for his own negligent conduct in the operation of the vessel, is gone.

All right to inquire into the contractual relationship between the United States, as owner, and the operator, is gone.

Once let it appear that the government owns the vessel, and that some agent, be he public, private or independent contractor, operates it for the owner, then *instanter* all direct recourse against the agent ceases, if the tort happened to have been maritime.

Respondent would have it that the *Lustgarten* decision has thrown the *Sloan Shipyards* case into the discard, and with it went all the other cases in which this court gave a right to sue an agent for the consequences of his own torts, even maritime.

We say that the *Lustgarten* decision has no such effect and was never intended to extend beyond the factual relationship as revealed in that record—a public agent, through a sub-public-agent, operating in the performance of a governmental function, and for whose breaches and torts the United States had to pay out of its own Treasury.

This court laid down this test: If the government will have to pay the judgment then it is the real party in interest and the exclusive remedy is in Admiralty.

And it was upon this theory that this respondent undertook to prove in the trial court that the government would have to pay the Brady judgment. Let us advert to that effort:

The suit was commenced in the state court May 31, 1940.

It was removed to the federal court on July 19, 1940.

Answer was served on July 24, 1940 (R. 1).

The answer admitted only the fact that the defendant was a Delaware corporation, and denied each and every other allegation. It set up only two defenses, to wit, contributory negligence and assumption of risk (R. 7-10).

Although Mr. Collins, the Special Assistant to the Attorney General and District Counsel of the Maritime Commission (R. 84) testified:

> "I have received instructions to object to the bringing of this case at common law as contrary to the policy of the government in these matters . . ." (R. 85, top),

nevertheless, he did not appear specially and suggest the interest of the United States, and ask the dismissal of the action, as he should have done. He took no affirmative step.

As the case approached trial, and about ten months after issue joined, the defendant, Roosevelt Steamship Company —not Collins—through its own personal counsel, moved (May, 1941) to dismiss the complaint upon the ground that the government would have to pay the eventual recovery, therefore the exclusive remedy was under the Suits in Admiralty Act. In that proceeding Collins did allow himself to be used by the defendant to bolster its motion, for he appeared as a mere witness, not as Special Assistant to the Attorney General and District Counsel for the Maritime Commission acting under instructions to dismiss the

common law action. He made no motion in his official capacity.

It seems to us that if Collins had been instructed by his superiors to object to the common law action he would have done something personally and promptly and not have been content to occupy the secondary role of a mere witness and let private counsel perform the duties of government counsel.

In this Brady case there was no factual proof in evidence that the government would have to pay the judgment. Collins' mere *ipse dixit* was not sufficient. The insurance policy was not in evidence so this court should disregard counsel's *offer to prove* that a "deductible" was assumed by the government as evidence of the fact (R. 89, bottom). That statement in the *offer to prove* is not evidence.

The petitioner is not "embarrassed by the Lustgarten case" as claimed in respondent's brief (p. 24). Were it not for the Sloan Shipyards case, and others in this court to the same effect, petitioner might be uncertain of her rights, but the *Lustgarten* case does not deprive petitioner of her right to proceed at law against an agent for damages attributable to the agent's own negligence, even if the vessel was owned by the United States and it was operated for the United States.

True, the opinion in the Lustgarten case said ". . . the remedies given by the Act are exclusive in all cases where a libel might be filed under it", but that language must be considered in its context and with due regard to the question before the court. In that case the public agent and its sub-agent were admittedly indemnified by the United States, and the government would have to pay the judgment. That fact was the determining factor in making the government the real party in interest. There was no question there of an independent or private operator. The public agency character of the Fleet Corporation and the operating company was conceded.

It was to get away from any possibility that the Roosevelt Steamship Company, and other operators, might be considered to be a "public" agent like the Colonial Navigation Company in the *Lustgarten* case, that the Congress was careful to characterize the operators under the new Merchant Marine Act as "private operators" in contradistinction to the "public operators" under the old Fleet Corporation set-up.

The test is the responsibility of the United States to pay the judgment. That absent, the United States is not interested.

What cares the United States if the Roosevelt Steamship Company is sued and has to pay for its own negligence?

What cares the United States whether its operator is sued at law or in admiralty, so long as it is not financially affected?

Since our brief was printed we have seen a critical review of the *Brady* decision in the Harvard Law Review. It so clearly points out the error of the Circuit Court of Appeals that we borrow, adopt and quote its language:

> "Had the vessel been privately owned, it is clear that the contract operator would be liable either at law or in admiralty. *The Barnstable*, 181 U. S. 464 (1901). The primary purpose of the Act, under which the instant court denied the plaintiff a remedy at law, is to prevent libels against Government ships by substituting a libel *in personam* against the United States. . . . This Act has been held to provide the exclusive remedy against the United States and its agencies. *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320 (1930); *cf. United States Emergency Fleet Corp.* v. *Rosenberg Bros. & Co.*, 276 U. S. 202 (1928); See Note (1930), Yale L. J. 1189. In the instant case the court rests its result squarely upon the decision in one of the cases considered along with the *Johnson* case wherein the court

reversed a judgment at law in favor of a seaman against both the Fleet Corporation and the operating company. *United States Shipping Board Emergency Fleet Corp.* v. *Lustgarten*, 280 U. S. 320 (1930). The case is clearly distinguishable, however, since in the *Johnson* case the Supreme Court stated that the United States would be ultimately liable for any judgment—apparently accepting the defendant's contention that the operating company was not a contract operator, but a public agent of the United States, and as such immune from ultimate liability. See Brief for Petitioners, pages 28-29, *United States Shipping Board Emergency Fleet Corp.* v. *Lustgarten, supra.* Whereas the operating agreement in the present case might have been similarly construed, the court assumed that a judgment against the defendant would not be equivalent to a judgment against the United States, nor would it be paid by the United States under the operating contract. Thus construed, the decision clearly goes far beyond the Supreme Court's interpretation of the Act. *Cf. Odgaard* v. *Cosmopolitan Shipping Co.*, 171 Misc. 244; 12 N. Y. S. (2d) 389 (Sup. Ct. 1939) (contra to instant case)? The decision allows a tortfeasor to escape liability, since the Suits in Admiralty Act provides a remedy only against the United States. Furthermore even if the United States might be liable on these facts, the plaintiff in the instant case has no remedy because she accepted compensation from the United States Employees' Compensation Commission. *Dahn* v. *Davis*, 258 U. S. 421 (1922); see Record, p. 116, *Brady* v. *Roosevelt Steamship Company, supra.* Such consequences are not indicated by precedent, and seem clearly not to have been within the contemplation of Congress in enacting the legislation."

Harvard Law Review, October, 1942, page 305.

If the bare fact that the vessel was government-owned, and the tort maritime, is sufficient, without more, to make the Suits in Admiralty Act apply, then the decision of the Circuit Court of Appeals was not erroneous.

If the decision in the *Sloan Shipyards* case, and others holding similarly, are no longer valid law, then the decision of the Circuit Court of Appeals was not erroneous.

If a law court has entirely lost jurisdiction over maritime tort actions against private corporations for damages for its own negligent conduct as an agent, then the decision of the Circuit Court of Appeals was not erroneous.

As we understand it, the law is:

Where an agent while operating a merchant vessel for the United States commits a maritime tort, and the government must pay the damages, then the exclusive remedy is under the Suits in Admiralty Act.

But where such tort is that of an agent, even though operating a merchant vessel for the United States, and where such agent may be held personally liable for the damages, and which damages the United States is under no legal obligation to pay, or reimburse, then suit may be brought directly against the agent, either at law or in admiralty.

Respectfully submitted,

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